Oversight Hearing on the Defense of Marriage Act

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COMMENTS OF THE AMERICAN CENTER FOR LAW AND JUSTICE, INC.

before the
Subcommittee on the Constitution
of the
Committee on the Judiciary
of the
United States House of Representatives

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SUMMARY

In 1996, the Congress passed, and President Clinton signed into law, the Defense of Marriage Act.[1] DOMA does two important things. First, DOMA permits States to choose what effect, if any, to give to any "public act, record, or judicial proceeding . . . respecting a relationship between persons of the same sex that is treated as a marriage under the law of such other State . . . ." Second, DOMA amends the Dictionary Act to provide express federal definitions of the terms "marriage" and "spouse."

The enactment of the Defense of Marriage Act was a welcome moment in the longer-

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1. The Defense of Marriage Act, 110 Stat. 2419 (1996), states:

SECTION 1. SHORT TITLE.

This Act may be cited as the " Defense of Marriage Act" .

SECTION 2. POWERS RESERVED TO THE STATES.

(a) IN GENERAL.-CHAPTER 115 OF TITLE 28, UNITED STATES CODE, IS AMENDED BY ADDING AFTER SECTION 1738B THE FOLLOWING:

"1738C. Certain acts, records, and proceedings and the effect thereof

"No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.".

SECTION 3. DEFINITION OF MARRIAGE.

(a) IN GENERAL.-CHAPTER 1 OF TITLE 1, UNITED STATES CODE, IS AMENDED BY ADDING AT THE END THE FOLLOWING:

"7. Definition of 'marriage' and 'spouse'

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

term struggle to support the ongoing stability of society's bedrock unit: the family. At the time of its consideration and adoption, DOMA was a measured response to an orchestrated plan to change the law of the fifty States on the question of marriage without the democratic support of the People of the States. That revolution in law required only two essential steps. First, in a State that had concluded under state statutory or constitutional provisions that same sex marriages were required to be recognized, such marriages would be instituted. Second, persons joined in such marriages would seek judgments related to creation, maintenance, dissolution or other habiliments of marriage under state law in jurisdictions other than where they had joined in marriage.

It is one level of constitutional consideration whether a State may define for itself what constitutes a marriage. It is another level of constitutional dimensions entirely to have the right of decision-making in one State foreclosed by an earlier, conflicting decision in another State. While a State can *choose* to bend its own important public policies to the judgments of sister States without constitutional grief, the plotted intention was *to force* States to bend their will and abdicate their important public policy interests by weight of the Full Faith and Credit Clause of the United States Constitution.

Exercising its clear authority under the Full Faith and Credit Clause,[2] Congress defined precisely the respect that sister States were bound to give to "judgments" of sister States that two persons of the same sex were married. In crafting DOMA, Congress showed its profound

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2. Congress not only defined the effect to be given to the judgments of one State respecting same-sex marriages in another State, but also crafted a definition of "marriage" for purposes of all federal statutes. The authority to define the terms employed in a statute of its own crafting lies within the power of Congress under the Necessary and Proper Clause. Thus, DOMA two separate principle effects are each supported by the clear authority

respect for the cooperative federalism that is the hallmark of our Republic. In that instance, recognizing the indisputably primary role of the States in defining the estate of marriage, and providing for its creation, maintenance, and dissolution, Congress deferred to the judgment of each State the question of whether any union other than that between one man and one woman could be accorded legal status as a marriage under state law. At the same time, the Congress properly took account of federal dimensions of marital relationships (under, for example, the Internal Revenue Code).

As far as DOMA goes, it is (1) justified as an exercise of clear Congressional authority under the Constitution, (2) of undiminished constitutionality in light of intervening decisions of the United States Supreme Court, (3) untarnished by lower court decisions subsequent to its enactment, and (3) substantially relied upon by the States.[3] Of course, that DOMA suffices for these purposes does not mean that the work of the Congress in this area is complete. Pending in both Houses at this time is legislation that would propound to the States an amendment to the United States Constitution, the Federal Marriage Amendment. That amendment would expressly define marriage throughout the Nation as the union of one woman and one man, barring any jurisdiction under the Constitution from licensing *as marriage* any relation other than the joining together of one woman and one man. By passing the FMA out to the States, the Congress would position the people of the United States to decide for themselves whether the present uncertainties and struggles should conclude by such a generally adopted resolution as a binding

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of Congress to enact the relevant portion of DOMA.

3. Thirty-eight States, relying on DOMA, have enacted statutory or constitutional provisions limiting marriage to the union of opposite sex couples. *See* http://www.marriagewatch.org/states/doma.htm In doing so, this supermajority of the States have expressly announced the strong public policy preference for limiting marriage

amendment to the Constitution.

I. CONGRESS WAS RIGHT TO ENACT DOMA BECAUSE OPPOSITE SEX MARRIAGES ARE THE KEY TO STABLE AND HEALTHY SOCIETIES

> And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. So God created man in his own image, in the image of God created he him; male and female created he them.

Genesis 1:26-27 (KJV).

Whether one agrees with the Biblical account of mankind's origin, it affirms the observable fact that we humans are of two kinds: male and female. Moreover, it is plain that these opposite sexes while unalike are, nonetheless, meet for each other. That consortium of a man and a woman, the proto-society, represents the creation of a bond unlike other bonds. Within the society of marriage, a man and a woman commune, conceive offspring, rear that offspring, and provide the stable blocks from which larger societies may be created. Before the rise of modern legal systems, this relationship and its contribution existed and were acknowledged.

Consequently, it is not surprising that virtually ever society has expressed, by statutes, laws, and regulations, a strong preference for marriage. At a minimum, the larger society has depended on the conjoining of men and women in fruitful unions to secure society's continued existence. Traditional marriages, in which one man and one woman create a lasting community,

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to opposite sex unions.

transmit the values and contributions of the past to establish the promise of the future.

Nor do the benefits of traditional marriage flow only *from* the couple *to* the society made stable by the creation of enduring marriages. The valued role of marriage in increasing the level of health, happiness and wealth of spouses, compared to unmarried partners, is established.[4] And the known research indicates that the offspring of traditional marital relations also trend toward greater health and more developed social skills.[5]

In contrast, sexual identicality, not difference, is the hallmark of same sex relationships.

Thus, to admit that same sex relationships can be valid marriages requires a concession that sexual distinctions are meaningless. That conclusion is not sensible or empirically supported. Consider, for example, the principle difference between married couples that would procreate and same sex couples seeking to do likewise. Children can never be conceived as the fruit of a union between couples of the same sex, perforce requiring the intervention of a third person. Secrecy in the donation process deprives the child of such same sex unions of an intimate relationship with their biological parent. Inclusion of the donor in the relationship transmogrifies the same sex union yet again into a tri-unity. While the math of these problems may be easy to follow, claims that raising children within a homosexual union is not damaging to the children are entirely impeached by flawed constructions and conclusions.[6]

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4. *See* "New Study Outlines Benefits of Marriage," The Washington Times, Oct. 17, 2000.

5. *See* "New Study," n.4, *supra*.

6. Two recent treatments thoroughly debunk the argument that social science has proved that children in the homes of same sex couples suffer from no diminution in socially relevant factors. *See* http://www.marriagewatch.org/issues/parenting.htm (linking to Affidavit of University of Virginia Professor Steven Lowell Nock filed in *Halpern et al. v. The Attorney General of Canada*, Docket No. 684/0 (Ontario Court of Justice, Quebec) (critiquing studies addressing the question of same-sex parenting and finding that all the reviewed studies

Traditional marriage makes such significant contributions to society that it is simply a sound policy judgment to prefer such marriages over lesser relationships in kind (such as co-habitation) or entirely different in character (same sex relationships). The unique nature of marriage justifies the endorsement of marriage and the omission of endorsements for same sex unions.

II. CONGRESS UNDERTOOK A MEASURED RESPONSE, EMBODYING CLEAR RESPECT FOR OUR COOPERATIVE FEDERALISM, IN ENACTING DOMA

As this Committee acknowledged, in its report on DOMA, marriage laws in the United States are almost exclusively governed by state law. *See* Defense of Marriage Act, House Report 104-664 (Committee on the Judiciary) (July 9, 1996), at 3 ("The determination of who may marry in the United States is uniquely a function of state law"). There are, however, federal statutes which rely on marital status to determine federal rights and benefits, so the definition of marriage is also important in the construction and application of federal laws (e.g., the Internal Revenue Code).

Prompted by the 1993 decision of the Hawaii Supreme Court and the subsequent immediate failure of the Hawaii Legislature to amend the State Constitution so as to overrule the State Supreme Court, Congress enacted the Defense of Marriage Act. DOMA reflected congressional concerns of a concerted effort to legalize same sex marriages via judicial decisions compelling states first to issue licenses for such marriages and then compelling other States to give effect to those marriages by application of the Full Faith and Credit Clause of the

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contained fatal flaws in design or execution, and that each study failed to accord with "general accepted standards of scientific research"). *See id*. (linking to Lerner and Nagai, "No Basis" (2001) (examining 49 studies of same sex

Constitution, U.S. Const. Art. IV, § 1. DOMA overwhelmingly passed in the House of Representatives on July 12, 1996, by a vote of 342 to 67, and then in the Senate on September 10, 1996, by a vote of 85 to 14. President Clinton signed DOMA into law on September 21, 1996.

As noted in the introduction, DOMA has two key provisions: one defining that "Full Faith and Credit" due to same sex marriages contracted in one State when put in issue in another State; the second one providing clarifying definitions for terms used in federal statutes. Congress, pursuant to its "effects" power under Art. IV, Sec. 1, reaffirmed the power of the States to make their own decisions about marriage:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe, respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state, territory, possession or tribe, or a right or claim arising from such relationship.

Pub. L. 104-199 sec. 2, 100 Stat. 2419 (Sep. 21, 1996) codified at 28 U.S.C. §1738C (1997).

The Federal law section states that under Federal law, a legally recognized marriage requires a man and woman. This is something Congress had assumed, but had never needed to clarify:

> In determining the meaning of any Act of Congress, or of any ruling, regulation,

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parenting and concluding that the studies are fatally flawed and do not provide a sound scientific basis for policy or law-making).

> or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Pub. L. 104-199, sec 1, 100 Stat. 2419 (Sep. 21, 1996) codified at 1 U.S.C. §7 (1997).

A. RESERVING STATE DIMENSIONS OF MARRIAGE TO THE STATES

When the 104th Congress considered, and enacted, DOMA, it expressly recognized the uniquely state-law ordered dimensions of marriage. H.R. Report 104-664, at 3. A view to the contrary would be incapable of substantial support. Efforts to modify the meaning of marriage have, perforce, been directed to the States, rather than to the federal government. Judicial decisions reflecting the press for state-based recognition of same-sex marriage abound: in Arizona, *Standhardt v. Superior Court,* Case No. 1 CA SA-03-0150 (Ariz. Ct. App.) (judgment affirmed); in Massachusetts, *Goodridge v. Massachusetts*, 440 Mass. 309, 798 N.E.2d 941 (2003), in New Jersey, *Lewis v. Harris*, Docket No. 15-03, Mercer County Super. Ct. (N.J.) (summary judgment granted, Nov. 5, 2003) , in Alaska, *ACLU v. Alaska*, Supreme Court Case No. S-10459 (Ak.), and in Hawaii, *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999).

And, the Nation's attention has been riveted to the situations in California, New Mexico, New Jersey, and Oregon, where City or County officials, without the compulsion of a judicial decision and without authority to do so, have begun issuing marriage licenses to same sex couples, even in direct defiance of state laws to the contrary.

Given that some States might choose to recognize same sex marriages within their peremptory authority over the licensing of marriage, Congress did not overextend itself and seek

to bar States from licensing such same-sex unions, or from choosing to recognize the legitimacy of such unions created under the law of sister States. Instead, Congress exercised its express constitutional authority under the Full Faith and Credit Clause to afford those States that had strong public policy reasons for supporting traditional marriages the means to decline to grant recognition to foreign same-sex marriages.

The constitutional authority of Congress to regulate the extra-state impact of state laws is patent in the Constitution and established in judicial decisions. The text of the Clause, Supreme Court decisions discussing it, legislative history, and scholarly commentary all reflect the broad scope of Congress' power to regulate the extra-state impact of state laws. This broad power is granted under Article IV, Section 1 of the U.S. Constitution, which provides:

> Full faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.

On its face, the Full Faith and Credit Clause assigns to Congress the capacity to determine the effect of one state's law in another state. *See Williams v. North Carolina*, 317 U.S. 287, 293 (1942) ("Congress may by general Laws prescribe the Manner in which [state] Acts, Records and Proceedings shall be proved, and the Effect thereof") (quoting Art. IV, Sec. 1). In another circumstance, in finding that statutes of limitations are procedural for conflicts purposes, the Supreme Court noted that if it is advisable to change the rule, "Congress [can] legislate to that effect under the second sentence of the Full Faith and Credit Clause." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988) (citations omitted). Plainly, Congress has the authority

under the Effects Clause to determine the extra-state effect of a state's statute of limitations. *See also Mills v. Duryee*, 11 U.S. 481, 485 (1813) ("it is manifest however that the constitution contemplated a power in congress to give a conclusive effect to such judgments"); *M'Elmoyle v. Cohen*, 38 U.S. 312, 324-25 (1839) ("the faith and credit due to it as the judicial proceeding of a state, is given by the Constitution, independently of all legislation . . . [but] . . . "the authenticity of a judgment and its effect, depend upon the law made in pursuance of the Constitution").

Concluding, with the force of law, that a type of state act or judgment will not have mandatory effect in another state is an example of prescribing the "effect" of a state's law in other states. Such legislation is precisely the kind contemplated by the effects provision of the Full Faith and Credit Clause. All DOMA does is to provide that the effect, within any given state, of a same-sex "marriage" contracted in another state will be determined by the states against which demands for recognition are made.

The Articles of Confederation stated: "Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." Art. IV, cl. 3. The Constitutional Convention of 1787 added a completely new second sentence: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof." U.S. Constitution, Art IV, Sec. 1. In amending the prior requirement of Full Faith and Credit, the Framers provided Congress a meaningful part in resolving the conflict among states regarding the recognition of others states' laws. *See* The Federalist No. 42 (James Madison) (discussing the Effect Clause as part of the powers of the Federal Government). *See also* Daniel A. Crane, The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act 6

Geo. Mason L.Rev. 307, 325 (1998).

Although DOMA has critics in the community of legal scholars, many support the power of Congress to determine the effect of one state's laws in another state. *See* James D. Sumner, The Full Faith and Credit Clause--It's History and Purpose 34 Or. L.Rev. 224, 239 (1955) (the Full Faith and Credit Clause "to be self-executing, but subject to such exceptions, qualifications, and clarifications as Congress might enact into law"); Walter W. Cook, The Powers of Congress Under the Full Faith and Credit Clause 28 Yale L.J. 421, 433 (1919) ("it seems obvious that [the Framers] were conscious that they were conferring . . . power on Congress to deal with the matter" of full faith and credit); Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law 92 Colum. L.Rev. 249, 331 (1992) ("It is common ground that Congress can designate the authoritative state law under the Effects Clause, specifying which state's law gets full effect in that class of cases").[7]

B. DEFINING MARRIAGE FOR THE PURPOSES OF FEDERAL LAW

The Dictionary Act, amended from time to time by Acts of Congress, including by the enactment of DOMA, serves to provide governing definitions of terms employed in federal

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7. By no means exhaustive, other articles noting Congress' power to determine the effects of full faith and credit, include: CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 869-870 (1987); G.W.C. Ross, *Full Faith and Credit in a Federal System* 20 MINN. L.REV. 140, 146 (1936); Timothy Joseph Keefer, Note, *DOMA as a Defensible Exercise of Congressional Power Under the Full-Faith-and-Credit Clause* 54 WASH. & LEE L.REV. 1635 (1997); Daniel A. Crane, *The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act* 6 GEO. MASON L.REV. 307 (1998); Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit* 32 CREIGHTON L.REV. 409, 452 (1998); Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages* 32 CREIGHTON L.REV. 147, 148 (1998); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and DOMA* 32 CREIGHTON L.REV. 255, 257 (1998); Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition* 32 CREIGHTON L.REV. 187, 223 (1998); Maurice J. Holland, *The Modest Usefulness of DOMA Section 2*, 32 CREIGHTON L.REV. 395, 406 (1998); Polly J.

statutes. *See Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, (2003) ("The Dictionary Act . . . was designed to supply rules of construction for all legislation"). Nor is the Dictionary Act, as some have supposed, an obscure provision of federal law. *United States v. Reid*, 206 F. 2Supp. 2d 132, 139 (D. Mass. 2002) (noting the amendment of the Dictionary Act by the provisions of DOMA). There is no doubt that Congress may define the terms used in statutes that it has enacted within the legitimate scope of its Legislative Power. Here, Congress has simply provided that "marriage" and "spouse" as those terms are used in federal law do not extend in the scope of their meanings to same sex unions or the participants in them.[8]

II. NO SUBSEQUENT UNDERMINING DECISION OF THE SUPREME COURT

A. Full Faith and Credit Clause Analysis Remains Unaffected

Although the Supreme Court has had occasion to discuss applications of the Full Faith and Credit Clause in decisions subsequent to the enactment of DOMA, none of those decisions puts the power exercised by Congress in the enactment of DOMA in doubt. *See Franchise Tax Bd. v. Hyatt*, 538 U.S. 488 (2003); *Jinks v. Richland County*, 538 U.S. 456 (2003); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

B. *Lawrence v. Texas* Does Not Undermine DOMA

The Facts in *Lawrence v. Texas*

Responding to a reported weapons disturbance in a private residence, Houston police entered petitioner Lawrence's apartment and saw him and another adult man, petitioner Garner,

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Price, *Full Faith and Credit and the Equity Conflict* 84 VA. L.REV. 747 (1998).

8. The definitions adopted in DOMA have been discussed in just a few reported decisions. *See In re Goodale*, 298 B.R. 886, 893 (W.D.Wash. Bankrptcy Ct. 2003); *United States v. Costigan*, 2000 U.S. Dist. Lexis 8625, *13-17 and n.10 (D. Maine 2000) (discussing definition of "spouse" under DOMA).

engaging in a private, consensual sexual act. Petitioners were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct. In affirming, the State Court of Appeals held, inter alia, that the statute was not unconstitutional under the Due Process Clause of the Fourteenth Amendment. The court treated *Bowers v. Hardwick*, 478 U.S. 186, (1986) controlling on that point.

Justice Kennedy's Opinion for the Majority:

The opinion of Justice Kennedy was joined by Justices, Stevens, Souter, Ginsburg, and Breyer. The majority granted certiorari to consider three questions:

> "1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law--which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples--violate the Fourteenth Amendment guarantee of equal protection of laws?
> "2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?
>
> "3. Whether Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841
>
> (1986), should be overruled?" Pet. for Cert. i.

Lawrence v. Texas, 123 S. Ct. 2472, 2476 (2003). The majority decided that *Bowers* should be overturned and that the case hinged on a violation of the Due Process Clause by the Texas statute.

The first indication that the ruling by the Court could imperil the Defense of Marriage Act is contained in Justice Kennedy's discussion of *Bowers* in which he says:

> The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-

> reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

Lawrence, 123 S. Ct. at 2478.

The last sentence quoted seems to signal sympathy from Justice Kennedy for the homosexual marriage. The very next sentence reads, "This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects." *Id.* The protected institution to which he adverts is marriage.

One point of continuing controversy is a tendency in the majority opinion to emphasize international law. Kennedy says:

> The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct.....
>
> Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case.

Lawrence, 123 S. Ct. at 2481. The tendency to invoke international law provokes criticism by the dissent, 123 S. Ct. at 2497. Certainly, focus upon particular international jurisdictions could foresage the Court's purpose to deploy its resources to insure that America accepts gay marriage as a select few other courts have done.

In addition to the foregoing, Justice Kennedy's opinion is possibly amenable to a reading that would support a challenge to bans on homosexual marriage. In particular, the majority opinion's discussion of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, (1992), raise the specter of such a sympathetic court. Revisiting *Casey*, Justice Kennedy invokes that aspect of *Casey* discussing constitutional protections for personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Justice Kennedy then asserts that the Constitution demands autonomy in making these choices and that persons in homosexual relationships may seek autonomy for these purposes.

Justice Kennedy concluded his discussion by returning to the question of the Court's earlier decision in *Bowers*, stating, for the Court, that the holding demeans the lives of homosexual persons and should be overruled. Some may argue that denying them the right to marry demeans the lives of homosexual persons, but it surely demeans them less and in ways vastly different than a criminal sanction for their conduct, and it is to the criminal sanction that Justice Kennedy referred.

The most compelling evidence that *Lawrence* does not undermine the Defense of Marriage Act comes towards the end of the opinion when Justice Kennedy says:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Lawrence, 123 S. Ct. at 2484. At some point in the future another case may come along which

will involve the question of whether or not the government must give formal recognition to homosexual relationships, but *Lawrence* is not that case.

Justice O'Connor's Separate Opinion Concurring in the Judgment:

Justice O'Connor concluded that Texas' sodomy statute violated constitutional requirements of equal protection. She wrote:

> That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations--the asserted state interest in this case--other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

Lawrence, 123 S. Ct. at 2488. Obviously, because the state interests in promoting and protecting the institution of marriage go beyond mere moral disapproval of homosexuals, Justice O'Connor's opinion leaves one with the firm sense that she would sustain state marriage statutes that limit the institution of marriage to opposite sex couples.

Justice Scalia's Dissent:

Justice Scalia was joined in dissent by Chief Justice Rehnquist and Justice Thomas. Justice Scalia lamented the decision and said it calls into question whether same sex marriage will be allowed. He wrote:

> It seems to me that the "societal reliance" on the principles confirmed in *Bowers* and

> discarded today has been overwhelming. Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation....
>
> State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of Bowers' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.

Lawrence, 123 S. Ct. at 2490.

He critiques Justice O'Connor's Equal Protection argument as applying as well to homosexual marriage and says that her conclusory statement that the government has an interest is insufficient. Justice Scalia concludes his discussion of marriage by saying that the Court is not to be believed when it claims that *Lawrence* does not deal with gay marriage. He says the majority's employment of *Casey* on the question of autonomy underlie the dismantling of the structure of constitutional law that "has permitted a distinction to be made between heterosexual and homosexual unions." *Id.* at 2498.

Justice Thomas' Separate Dissent

Justice Thomas added an extremely brief opinion expressing his view that the Texas sodomy statute was uncommonly silly, but within the sphere of the Texas legislature.[9]

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9. The Defense of Marriage Act has been a point of discussion in a handful of reported decisions; no reported case has concluded that DOMA was unconstitutional. *See In re Goodale*, 298 B.R. 886, 893 (W.D.Wash. Bankrptcy Ct. 2003) (relying on DOMA's amendment of the term "spouse" in allowing a debtor to avoid a lien reflecting support obligations for former partner); *Mueller v. CIR*, 2001 U.S. App. Lexis 9777 (7th Cir. 2001) (rejecting equal protection challenge to DOMA because period of assessments and fines predated the effective date

IV. DOMA ALLOWS THE STATES TO MEET THE POTENTIAL FOR JUDICIAL MISCHIEF IN OTHER STATES

The legislative history supporting the enactment of DOMA adverts to the long running battle waged by certain segments of the American populace to accomplish radical changes in the institution of marriage, and to do so without resort to the difficult tools provided in the Constitution: majority rule and constitutional amendment. H.R. Report 104-664, at 1-18. That report, now almost a decade in age, describes a movement that is, it seems unflagging in its commitment to the goal of changing marriage. In the intervening years, the pressure from that quarter has not lessened.

Following the disastrous and unjustifiable decision of the Supreme Court in *Lawrence v. Texas*, the same-sex marriage movement was invigorated, and issued a clarion call to "get busy and get equal." *See* http://www.aclu.org/getequal. Not only the ACLU, but also Human Rights Campaign, *see* http://www.hrcactioncenter.org , Lambda Legal Defense and Education Fund, *see* http://www.lambdalegal.org, and the National Organization for Women, *see* http://www.now.org, all are pressing full court for the radical overhaul of state laws regulating marriage and limiting marriage to the union of one man and one woman.

DOMA guarantees to each State that they may refuse to give cognizance to same sex marriages contracted elsewhere if recognition of such marriages would be inconsistent with important public policies. That guarantee stands as the principal obstacle between those who are

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of DOMA); *Mueller v. CIR*, 39 Fed. Appx. (7th Cir. 2002) (rejecting challenge to constitutionality of DOMA because taxpayer had not sought legal recognition of his relationship as a marriage); *United States v. Costigan*, 2000 U.S. Dist. Lexis 8625, *13-17 and n.10 (D. Maine 2000) (discussing definition of "spouse" under DOMA); *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1385 n.19 (S.D. Fla 2001) (noting DOMA's role in precluding the recognition of homosexual marriage in Florida).

litigating piecemeal their claim of a right to same sex marriage and their goal of nationalizing same sex marriage by the migration of our people together with the duty to give full faith and credit to foreign state judgments, acts and records. The Department of Justice, under President Clinton, concluded that DOMA was constitutional. Congress concluded that DOMA was constitutional and an appropriate exercise of its definitional authority respecting the Effects Clause. No court acting consistent with the precedent of the Supreme Court could find DOMA unconstitutional.

Where mischief may still lie, and where DOMA may not provide the solution, is within the jurisdiction of a single State. Thirty eight States that have adopted DOMA provisions by statute or constitutional amendment. Nonetheless, in each of them the risk exists, as litigation in California, New Jersey, Indiana, North Carolina, and elsewhere demonstrates, that a state court judge could reject her own State's assertion of important public policy interests in opposite sex marriage. A judge so inclined could find that a state constitutional provision for due process of law or equal protection requires that same sex couples have the same right to marry under state laws as opposite sex couples. Then, in that case, while DOMA will have done all the work intended by Congress to be done, the mischief can still be worked within a State; DOMA, however, helps to insure that the mischief is not easily exported to sister States.

CONCLUSION

DOMA is a measured, constitutional response to the orchestrated movement to overturn State laws on marriage without benefit of the democratic process that normally determines issues of state law. It serves to slow the spread of decisions that are unpopular in the States where they are rendered and less welcome elsewhere. While an amendment is a welcome resolution to the

problem, absent such an amendment, DOMA serves the important purpose of securing to each State the right to decide how to define marriage.